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No. 96-1763

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MARSHALL SPIEGEL,

Petitioner,

v.

JAMES MESCALL, *ET AL.*,

Respondents.

On Petition For Writ of Certiorari To
The Illinois Supreme Court

REPLY BRIEF FOR PETITIONER

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ARGUMENT

Today, when the contours separating proper from improper state interference in the relationship between parent and child are a matter of substantial public debate, this case presents the Court with a most timely question. May a state interpret its common law tort of defamation so as to deny a parent who is the victim of a bad faith report of child abuse a judicial remedy for infringement of the parent's constitutionally-protected right to carry on his relationship with his child without unwarranted government intrusion?

Here, the trial court ruled that a report of child abuse made to DCFS did not constitute a publication for purposes of Spiegel's defamation action. The upshot of that ruling is deeply troubling. It means, in effect, that if a parent is the victim of a bad-faith report of child abuse and seeks vindication through an action for defamation, that remedy is futile *ab initio* for lack of the critical predicate of "publication." The State of Illinois therefore construed its law in such a way as to deny one of its citizens an effective remedy for violation of a constitutional right. Accordingly, this case falls under the rubric of due process jurisprudence involving the fundamental right to judicial relief and access to the courts.

In his petition, Spiegel showed that his case included the components of a valid Fourteenth Amendment Due Process claim. Specifically, he showed *(1)* that the familial interest at stake is one this Court has recognized to be constitutionally-protected, Pet. at 6; and *(2)* that the challenged conduct is attributable to the State and thus qualifies as state action. Pet. at 7-10. In their opposition, Respondents do not address either of these fundamental points. They respond with two different contentions, neither of which is availing.

I. THIS COURT HAS JURISDICTION TO REVIEW PETITIONER'S CASE.

Respondents argue that the Court lacks jurisdiction to review Spiegel's case because his due process claim is raised "for the first time" in the petition for *certiorari*. Br. Opp. at 4. This characterization, which goes both to the timing and the nature of the constitutional question, is incorrect.

With respect to the *timing* of Spiegel's claim, it is important to keep in mind the procedural context in which the claim arose. The trial court granted summary judgment for Mescall on the ground that a report of child abuse to DCFS does not qualify as a publication for purposes of proving defamation. Spiegel appealed the trial court's holding on that score. The Illinois court of appeals, however, did not address this issue. It upheld the trial court on the theory that Spiegel had not introduced sufficient evidence to rebut the statutory presumption that Mescall's report was made in good faith. The Illinois supreme court declined to review the case. Spiegel thus raised the issue whether the reporting of child abuse constituted a publication at the earliest opportunity, *i.e.*, before the trial court, and then repeated the argument in his papers to the court of appeals.

That the court of appeals ignored the issue does not, contrary to Respondents' assertion, deprive the Court of jurisdiction. The modern rule is that a federal claim cannot be considered by this Court unless it has been *either* raised in the state court *or* considered and resolved by the state court. *See McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940); *Hill v. California*, 401 U.S. 797, 805 (1971). Respondents' contention that "[t]his Court's review of judgments rendered by state courts is limited to circumstances where federal questions have been *both* raised and decided in the state court below," Br.

Opp. at 3, is thus incorrect. In sum, Spiegel's substantive claim was timely raised.

As to the *nature* of Spiegel's claim, the pivotal question is whether raising the publication issue directly put into play a constitutional question. It did.

The Court's precedents on this general point lay out a variety of circumstances in which it can be said that a federal question is extant. Among these are cases reflecting the Court's position that, where it is plain that the dynamics of due process have affected a lower court's decision, a properly raised federal question is present. For example, in *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978), the Court stated that an objection invoking "fundamental principle[s] of judicial fair play" should have "sufficed to alert the trial judge to petitioner's reliance on due process principles." Similarly, in *Martinez v. California*, 444 U.S. 277, 282-83 n.6 (1980), appeal jurisdiction was accepted over a state court ruling that did not expressly mention the federal Constitution but where appellants' response to a demurrer in the state trial court reflected that they were relying on a "federally protected right to life." In other words, because the Court has the power to inquire into the raising of a federal question, if the Court concludes that the federal question was necessarily decided by the state court, jurisdiction can be asserted. *Street v. New York*, 394 U.S. 576 (1969).

This pragmatic approach is wholly appropriate given the axiom that due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," but rather "represent[s] a profound attitude of fairness." *Anti-Fascist Comm'n v. McGrath*, 341 U.S. 123, 162-63 (1941) (Frankfurter, J., concurring). Here, however, that fairness principle was abandoned. The trial court ruled that a report to DCFS did not constitute a publication for purposes of

a defamation action. The obvious consequence of that ruling was that Spiegel would be precluded from seeking a remedy for infringement of a constitutional right. That this consequence implicates due process could not have been any plainer to the trial court. The conspicuous purpose in litigating the publication issue was to establish that, indeed, Spiegel had the right to seek a remedy in the form of a state tort action. That is nothing less than the right to judicial process, a right that is indisputably of constitutional stature.

The integral relationship between the deprivation of a constitutional right and the subsequent opportunity to achieve a post-deprivation remedy for infringement of that right has been stated by the Court repeatedly. For example, in *Ingraham v. Wright*, 97 S. Ct. 1401 (1977), the Court considered whether corporal punishment in public schools violated the Eighth Amendment. Fundamental to the Court's disposition of the case was an assessment of the opportunity for a state law remedy in the event that punishment was found to be excessive. The majority followed the settled principle that 'what process is due' depends on "the private interest that will be affected," and "the probable value, if any, of additional or substitute procedural safeguards," *id.* at 1414 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Here, the trial court's ruling, which foreclosed Spiegel's defamation action, eliminated the availability of "additional or substitute procedural safeguards." *Ibid.*

A similar analytical approach has been applied in other fact patterns. For example, Justice Stevens has urged that it is the finding of a sufficient state court process to protect one's interest in his reputation (namely, a state action for defamation) that justified denial of relief to the plaintiff in *Paul v. Davis*, 424 U.S. 693 (1976). *See Ingraham v. Wright*, 97 S. Ct. 1427 (Stevens, J., dissenting). In *Davis*, a sheriff had distributed to local merchants a leaflet of "active shoplifters" which included

the name and photograph of the plaintiff Davis. Davis had been arrested for shoplifting but his case was later dismissed. He brought an action against the sheriff, alleging deprivation of a constitutional "property interest" in his reputation. The Court's rejection of Davis' claim should be understood, according to Justice Stevens, in light of Davis' viable option to seek a remedy —namely, a defamation suit against the sheriff in state court. State law did not grant the sheriff any privilege to defame, and there was no general law of defamation to which state officials were exempt. In short, there was a state procedure, a tort suit, available to remedy the deprivation of Davis' interest in his reputation. *Ingraham v. Wright*, 97 S. Ct. at 1427.

Applying this principle to the instant case dramatically illustrates the sense in which the constitutional issue was properly before the trial court. The cases noted above establish that the efficacy of a state court remedy to vindicate the deprivation of a constitutional right is key to assessing the due process implications of state action. Here, as in *Paul v. Davis*, the appropriate state court remedy was a tort action for defamation. But in our case that remedy was wholly foreclosed when the trial court ruled that making a report to DCFS did not constitute a publication for the purposes of a defamation action. In light of the significance that the availability of such a remedy has in the due process balance, the lower court's decision manifestly involved a "fundamental principle of judicial fair play" plainly sufficient "to alert the trial judge to petitioner's reliance on due process principles." *Taylor v. Kentucky*, 436 U.S. at 482 n.10. Because the constitutional implications of the trial court's ruling were that obvious, Respondents' contention that the Court lacks jurisdiction to review Spiegel's case is erroneous.

Finally, it should be noted that the prudential considerations underlying the Court's jurisdictional requirement

do not, contrary to Respondents' suggestion, cut against the finding of jurisdiction in this case. For example, the Court's general concern that the record below be sufficiently developed to permit intelligent review should not be heightened here. Spiegel timely raised the publication issue. That the court of appeals decided the case on other grounds and the Illinois supreme court denied Spiegel leave to appeal, were matters over which Spiegel obviously had no control and do not diminish the constitutional significance of the question raised. Nor is there a genuine risk that the question might have been "blocked" by the state court on adequate and independent state grounds, *see Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969), inasmuch as Spiegel's due process right to obtain judicial relief for the constitutional infringement at issue is exclusively a federal question.

II. SPIEGEL'S PETITION PRESENTS FOR REVIEW A QUESTION OF LAW, NOT A MERE "FACTUAL DISAGREEMENT."

Respondents further contend that Spiegel's petition should be denied because this Court's "review [of] factual determinations is not permitted." Br. Opp. at 5. We are uncertain as to Respondents' precise point. It is correct, as discussed in the petition and *supra* at 1, that the Illinois court of appeals disposed of Spiegel's appeal on evidentiary grounds unrelated to the publication issue. That basis for the appellate court's decision, however, does not alter the essential fact that Spiegel timely raised the issue of publication. As noted earlier, contrary to Respondents' understanding, the modern rule is that the Court will not review a federal claim unless it has been *either* raised in the state court *or* considered and resolved by the state court. *See McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940); *Hill v. California*, 401 U.S. 797, 805 (1971). In other words, the rule envisages that an appellate court will sometimes

base its decision on a ground not raised on appeal, but that this should not preclude this Court's review of the federal question.

If, on the other hand, Respondents' contention is rather that Spiegel's constitutional claim is immaterial because it was unnecessary for the court of appeals to reach the publication question (the court of appeals having disposed of the appeal on evidentiary grounds), that would also be incorrect. If this Court grants review, decides the constitutional question in Spiegel's favor and remands, the lower court may ultimately rule a second time that Spiegel cannot defeat defendants' summary judgment motion. But because this Court will have established that Spiegel's risk of injury is of *constitutional* magnitude—that the absence of a remedy in defamation will deprive Spiegel of due process—we cannot assume at this juncture that the court of appeals would rule the same way. Indeed, because it is well established that summary judgment is a nearly impossible burden to discharge where constitutional rights are at risk, it is more likely than not that summary judgment would be denied. 10A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § CV 2732.2 (1996). For this reason, Respondents' objection to grant of the petition on this ground misses the mark.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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